BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	

REPLY TO OPPOSITIONS OF PRIMECO PERSONAL COMMUNICATIONS, L.P.

PrimeCo Personal Communications, L.P. ("PrimeCo") hereby files its reply to the oppositions to petitions for reconsideration filed by the State of Hawaii ("Hawaii") and the State of Alaska ("Alaska") in this proceeding.

I. HAWAII'S AND ALASKA'S ARGUMENTS SUPPORTING THE PROCEDURAL VALIDITY OF THE APPLICATION OF RATE INTEGRATION TO CMRS PROVIDERS ARE WITHOUT MERIT

Hawaii and Alaska each oppose arguments raised by PrimeCo and other petitioners for reconsideration that demonstrated that subjecting Commercial Mobile Radio Service ("CMRS") providers to rate integration in the context of the *Reconsideration Order* violates the Administrative Procedure Act ("APA"). Hawaii and Alaska argue that statements in the *NPRM* and the *Rate Averaging/Integration Order* referring to "providers of interstate interexchange services" were sufficient to satisfy the procedural and notice requirements of the APA and to extend rate integration requirements to CMRS providers.[1] In this regard, Hawaii also refers to a footnote in the *NPRM* which mentions "wireless" service in the context a discussion of the

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[1] Alaska Opposition at 7-9; Hawaii Opposition at 7 n.17 *incorporating by reference* Opposition of the State of Hawaii to PrimeCo's Motion for Stay at 3-6. *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 7141 (1996)("*NPRM*"); 11 FCC Rcd 9564 (1996)("*Rate Averaging/Integration Order*").

appropriate geographic market for interstate, interexchange service and to the fact that the Commission rejected arguments that AMSC Subsidiary Corporation ("AMSC"), a mobile satellite service carrier ("MSS"), should not be subject to rate integration.[2]

PrimeCo and other petitioners refuted this argument in their petitions for reconsideration.[3] The limited references cited by Hawaii and Alaska are not adequate to constitute notice of the Commission's intent to depart from prior practice and expand its rate integration policies to include CMRS carriers. Indeed, the references were far more oblique than the "obscurely placed" Commission language that the Court found inadequate to constitute notice in *McElroy Electronics Corp. v. FCC*.[4]

Further, the inadequacy of the Commission's "rulemaking" action with respect to application of rate integration requirements to CMRS is reflected in the fact that there remain numerous, unresolved problems associated with imposing rate integration upon CMRS carriers, and the record reflects no discussion regarding either application or implementation issues pertaining to CMRS. Indeed, the only way CMRS is even covered in the orders is by *assuming* (without record reference) that rate integration applies to CMRS carriers.

PrimeCo submits that the absence of information and discussion on the record is further evidenced by the oppositions filed by Alaska and Hawaii themselves, each of which expend substantial effort in attempts to demonstrate how and why they believe rate integration

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2 Hawaii Opposition to Motion for Stay at 3-5.

3 PrimeCo Petition at 6-11; Bell Atlantic Mobile Petition at 4-7; and BellSouth Petition at 6-15.

4 *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993).

can and should apply in the CMRS context.[5] In this regard, both Alaska and Hawaii also admit that there are significant unresolved issues associated with applying rate integration and the affiliate requirement to CMRS providers. For example, both Hawaii and Alaska concede that further analysis is warranted regarding which CMRS service offerings should be subject to rate integration.[6] Hawaii and Alaska also admit to problems associated with applying the affiliate rule to CMRS carriers, but cannot agree as to the scope and appropriate remedy of the problem.[7] Simply put, such extended discussions by these parties would have been unnecessary had issues associated with application of rate integration to CMRS providers been addressed previously by the Commission.

Finally, Hawaii suggests that any procedural failing regarding the application of rate integration to CMRS providers "has been rendered de facto moot because the Commission is now considering the CMRS issue directly through its review of these petitions for reconsideration."[8] BellSouth's Petition thoroughly debunks this novel theory.

> The Commission cannot retain the CMRS rate integration policy in force on the ground that it was adopted in response to a petition for reconsideration or *ex parte* filings. Courts have held that an agency may not "'bootstrap' notice from a comment." Moreover, the agency cannot fix notice deficiencies on reconsideration. *Each substantive rule adopted in a rulemaking must be the logical*

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5 Hawaii Opposition at 17-23; Alaska Opposition at 2-7.

6 Hawaii Opposition at 22-23; Alaska Opposition at 10-11. PrimeCo notes that Hawaii has the temerity to criticize CMRS providers for not being "forthcoming in producing information on the technical aspects of their wireless networks," despite the fact that Hawaii admits to the significant uncertainty of what CMRS service offerings are interstate, interexchange services, and the absence of any record discussion of this issue. Hawaii Opposition at 23.

7 Hawaii Opposition at 22-23; Alaska Opposition at 14-16.

8 Hawaii Opposition at 7, n.17.

> *outgrowth of a notice of proposed rulemaking that provided fair notice of the subject and permitted meaningful comment by those affected before the rule is adopted, not afterward.*[9]

In sum, the Commission failed to put the issue of imposing rate integration on CMRS providers out for notice, and therefore failed to compile an evidentiary record upon which it could base a decision to impose rate integration and the affiliate requirement upon CMRS carriers. Thus, the Commission's action in this regard is fatally flawed and cannot be remedied on reconsideration. At this point, if the Commission intends to continue exploring rate integration issues in the CMRS context, it must, at a minimum, commence a separate rulemaking procedure on this issue, as suggested in the supporting comments of U S WEST, Inc.[10] Further, as discussed below, PrimeCo submits that competition in the CMRS industry is adequate to protect the legitimate interests of consumers in non-contiguous remote areas without the irrational and anticompetitive impacts of the rule adopted in the *Reconsideration Order*. If Hawaii and Alaska disagree with this conclusion, however, such additional rulemaking procedures will also provide them the opportunity to prove their case.

II. THE OPPOSITIONS SUPPORT PROVIDING CMRS PROVIDERS WITH SOME RELIEF FROM THE AFFILIATE REQUIREMENT

Petitioners in this proceeding have identified a number of compelling reasons why the Commission should not apply the affiliate requirement of its rate integration rule to CMRS

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[9] BellSouth Petition at 11 (emphasis supplied) citing *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991); *American Federation of Labor v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985); *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 901 (D.C. Cir. 1978); *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994); *National Mining Ass'n v. MSHA*, 116 F.3d 520, 531 (D.C. Cir. 1995); *Florida Manufactured Housing Ass'n v. Cisneros*, 53 F.3d 1565, 1576 n.4 (D.C. Cir. 1995); *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1275 (D.C. Cir. 1994)(footnotes omitted).

[10] Comments of U S WEST, Inc. at 8.

providers.[11] As demonstrated in the Petitions filed, application of the affiliate requirement to CMRS providers will have significant anti-competitive effects and could profoundly disrupt existing ownership arrangements for many carriers such as PrimeCo. In fact, Hawaii and Alaska also agree that there are significant problems associated with applying the affiliate rule to CMRS providers and have expressly supported providing some relief in this regard.[12] Therefore, PrimeCo urges the Commission, *at a minimum*, to relieve CMRS carriers from the obligation to integrate rates across affiliates.

In the absence of such relief, application of the affiliate requirement could easily require CMRS carriers to agree to set a few (or possibly a single) national interexchange, interstate rate for CMRS long distance offerings.[13] Such a result, on its face, could arguably constitute unlawful price fixing and would run counter to important antitrust policies. Indeed, this result is directly contrary to the important pro-competitive purposes of the 1996 Act.[14] Moreover, PrimeCo believes that it is unlikely that anyone would benefit from standardizing CMRS long distance rates in this way. For example, Hawaii admits that CMRS wide-area calling plans developed in the absence of rate integration promote the public interest but

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11 *See, e.g.,* AirTouch Petition at 14-15; Bell Atlantic Mobile Petition at 14-15; BellSouth Petition at 21-24; Personal Communications Industry Ass'n Petition at 8-9; and PrimeCo Petition at 15-17.

12 Hawaii Opposition at 23-25; Alaska Opposition at 14-16. Alaska and Hawaii, however, cannot agree as to the appropriate scope of such remedy.

13 *See* BellSouth Corporation's Comments in Support of PrimeCo's Motion for Stay of Enforcement, CC Docket No. 96-61, at 9, Attachments A-C (filed September 29, 1997).

14 The legislative history makes clear that the 1996 Act was intended to establish a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening up all telecommunications markets to competition." Joint Explanatory Statement at 1.

stubbornly insists that Section 254(g) requires rate integration of the interstate, interexchange portion of such plans.[15] In this regard, however, Hawaii ignores the likelihood that in order to integrate rates CMRS carriers would be forced to move away from low-cost wide area calling plans, resulting in higher rates for consumers. Again, the current record does not support Commission determinations on this issue.

III. HAWAII'S AND ALASKA'S OPPOSITION TO FORBEARANCE IS ALSO WITHOUT MERIT

Hawaii and Alaska both oppose forbearance from applying rate integration to CMRS providers under Section 10 of the Communications Act. Alaska and Hawaii argue that the statutory requirements for forbearance have not been satisfied.[16] These parties suggest further that the standards cannot be met because rate integration for CMRS providers is necessary to ensure the reasonableness and nondiscriminatory nature of CMRS rates and practices and to provide consumer protection.[17] Indeed, Hawaii goes so far as to say that "forbearance from Section 254(g) would severely harm consumers. . . . It is abundantly clear that consumers on Hawaii and other offshore points would continue to pay discriminatory CMRS rates if forbearance from rate integration were granted."[18]

Neither Alaska nor Hawaii, however, provide evidentiary support for their allegations that consumers in non-contiguous remote areas are paying or will in the future pay discriminatory CMRS interstate, interexchange rates. Instead of evidence of actual harm, these

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15 Hawaii Opposition at 19.

16 Hawaii Opposition at 9-17; Alaska Opposition at 9-14.

17 *Id.*

18 Hawaii Opposition at 10.

parties *assume* that because CMRS rates were not previously integrated and because the Commission previously found that rate integration is necessary to protect against discriminatory interstate, interexchange rates in the *wireline* context, CMRS interstate, interexchange rates are *per se* discriminatory. This argument is patently ridiculous.

The facts presented in the Petitions clearly demonstrate that the rigors of a competitive marketplace eliminate opportunities and incentives for carriers to establish unjust or unreasonable rates or to otherwise act in an anticompetitive and discriminatory manner.[19] For example, the competitive pricing plans being offered by both cellular and PCS providers — adopted in the absence of a rate integration requirement — have already created substantial downward pressure on service prices and roaming fees. Since 1987, bills for cellular service have declined approximately 64%.[20] Further, a 1996 report by the Yankee Group indicates that PCS rates are averaging 15%-30% lower than the prices of incumbent cellular operations, again reflecting the effect of competitive pressures on CMRS rates.[21]

Thus, the best evidence available demonstrates that competition is working well to protect consumers from unreasonable and discriminatory CMRS rates and practices. Moreover, as both Hawaii and Alaska recognize, remedies are available under Sections 202 of the Communications Act, to the extent that consumers in non-contiguous remote areas can

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19 *See, e.g.,* PrimeCo Petition at 22-25; Cellular Telecommunications Industry Ass'n Petition at 10-11; Bell Atlantic Petition at 15-16; TDS Petition at 4-5.

20 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 7 Com. Reg. (P&F) 1, 8 (1997).

21 The Yankee Group, *Pricing Wireless: A Global Comparative Assessment*, Chapter 4 at 4.1 (1996). In this regard, the Yankee Group also identified a trend toward an increasing number of service plans with bundled air time, volume discounts, and features. *Id.* at 4.4.

demonstrate that specific CMRS interstate, interexchange rates or practices are discriminatory.[22] Therefore, there is no basis for Hawaii and Alaska to argue that integration of CMRS interstate, interexchange rates is necessary to protect consumers from unreasonable and discriminatory CMRS rates and practices.

In addition, and as previously discussed, the history of this proceeding demonstrates that questions regarding the need for rate integration in the CMRS context have not previously been raised before the Commission. Indeed, CMRS issues were interjected into this proceeding only peripherally through GTE's petition for reconsideration.[23] Now, however, Alaska and Hawaii have seized this opportunity in an effort to expand the Commission's rate integration policy beyond its historical limits and beyond the limits intended by Congress when it enacted Section 254(g) of the Communications Act.

Nevertheless, Hawaii and Alaska have not provided data evidencing any need for this extension of rate integration and therefore PrimeCo continues to believe that new Section 10 compels the Commission to forbear from imposing Section 254(g) rate integration requirements on CMRS carriers, if such requirements do in fact apply to CMRS carriers. Indeed, as Bell Atlantic Mobile demonstrates in its filing, the Commission has already found that competitive nature of the CMRS market satisfies the forbearance standard with respect CMRS rates and the Commission is compelled to forbear from applying rate integration to CMRS carriers.[24]

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22 Hawaii Opposition at 10; Alaska Opposition at 11.

23 *See* PrimeCo Petition at 8-9.

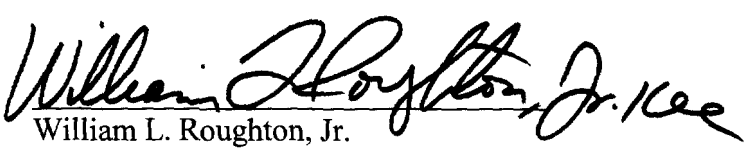
24 *See* Bell Atlantic Mobile Petition at 15-21.

IV. CONCLUSION

For the foregoing reasons and the reasons set forth in the Petitions filed in this proceeding, PrimeCo urges the Commission to disregard the oppositions of Hawaii and Alaska and to reconsider its imposition of rate integration obligations upon CMRS carriers under 47 U.S.C. § 254(g) and 47 C.F.R. § 64.1801. Alternatively, and at a minimum, PrimeCo submits that the Commission must relieve CMRS carriers from the affiliate requirement. Finally, and in the event CMRS carriers are deemed to be subject to rate integration, the Commission must exercise its authority under Section 10 of the Communications Act to forbear from applying the rate integration provisions of Section 254(g) to CMRS carriers.

Respectfully submitted,

PRIMECO PERSONAL COMMUNICATIONS, L.P.

By: 

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